UAW RETIREE Medical Benefits Trust

January 30, 2020

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

File No. S7-23-19

Dear Secretary Countryman,

We appreciate the opportunity to comment on the Commission's proposing release, "Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8," Exchange Act Release No. 87458 (the "Release"). The UAW Retiree Medical Benefits Trust (the "Trust") is the largest non-governmental provider of retiree health in the country, providing benefits to 631,000 UAW retirees and their dependents. As an institutional investor, the Trust has $61 billion in assets under management.

The Trust has substantial experience with the shareholder proposal process. The Trust established a corporate governance program in 2010 to protect the long-term value of portfolio companies, and has engaged with companies on many governance issues, including board leadership, executive compensation, board diversity, risk oversight and drug pricing risk. The Trust also co-leads Investors for Opioid and Pharmaceutical Accountability ("IOPA"), which includes 59 investors with over $4.2 trillion in assets under management. IOPA members, including the Trust, have submitted proposals to pharmaceutical manufacturers, distributors and retailers, seeking governance reforms to encourage greater accountability and better manage business risk, as well as improving disclosure about those risks.

The Trust strongly opposes the changes proposed in the Release (the "Proposed Amendments") because they would impair shareholders' ability to pursue value-enhancing governance changes at companies and deprive shareholders of the ability to communicate with companies and with one another, all in exchange for very small and uncertain cost savings for companies. Curtailing the shareholder proposal process as the Commission has proposed would, over time, lower corporate governance standards and increase the cost of capital for U.S. companies. The Proposed Amendments are thus at odds with the Commission's mandates to protect investors and promote capital formation.

Moreover, the Release does not comply with the standards for rulemaking set by the courts and the Commission itself, which require a robust cost-benefit analysis. In our view, because the lost benefits of the shareholder proposal process are not analyzed in a balanced way and the cost savings estimates rest on insufficient data, the Release does not establish the economic baseline against which the Proposed Amendments must be evaluated. The Release also does not make the case that the Proposed Amendments are necessary. For all of these reasons, we urge the Commission not to adopt the Proposed Amendments.

The Proposed Amendments

The Proposed Amendments would make major changes to the shareholder proposal process. With insufficient justification, they would:

- Disadvantage smaller shareholders by raising the ownership threshold for submitting a proposal by over 1200% for one-year holders, and allowing shareholders with smaller stakes to submit a proposal only after holding for three years;
- Prematurely cut off consideration of important issues by significantly raising the levels of voting support proposals must obtain in order to be resubmitted;
- Interfere with shareholders' ability to use a representative to assist them with the shareholder proposal process; and
- Require shareholders, but not companies, to make themselves available for a meeting shortly after the proposal submission deadline.

The Benefits of the Shareholder Proposal Process

The Release presents an unbalanced picture of the shareholder resolution process as imposing substantial burdens on companies with few, if any, benefits. The Release estimates that the Proposed Amendments would reduce the number of shareholder proposals by 37%, a substantial decrease from current levels, but does not analyze the negative impacts of that drop on companies, shareholders or the capital markets. This treatment violates the Commission's own guidance on rulemaking, which requires it to establish the economic baseline–"the best assessment of how the world would look in the absence of the proposed [rule]"[1]–and

---

[1] Memorandum to Staff of the Rulewriting Divisions and Offices from the Division of Risk, Strategy and Financial Innovation and Office of General Counsel re: Current Guidance on Economic Analysis in SEC Rulemaking, at 7 (Mar. 16, 2012) (https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf) ("2012 Guidance").

to "evaluate the costs and benefits even-handedly and candidly."[2] The benefits of the shareholder proposal process that would be lost if the Proposed Amendments are adopted should be analyzed and weighed against the benefits of adopting those changes, which, as we discuss in the next section, are minimal.

Promotion of Value-Enhancing Reforms in Corporate Governance and Policies

A primary benefit of the shareholder proposal process is that it can be used to promote changes in corporate governance and policies that improve corporate performance and provide valuable information to shareholders. This "private ordering" has been lauded as facilitating better-tailored reforms by allowing consideration of company-specific factors.

The Commission admits that "value-enhancing" proposals could be excluded as a result of the Proposed Amendments, including proposals that could limit entrenchment, and that "the potential exclusion of [such] proposals could be detrimental to companies and their shareholders."[3] But the Release does not discuss the financial impact of entrenchment, which has been the subject of numerous empirical studies. Given the central role of shareholder proposals in engaging companies around entrenching governance arrangements, that omission is noteworthy.

A 2013 study by Cremers and Ferrell using data from 1978 through 2006 found that weaker shareholder rights, as measured by performance on an index of governance arrangements (and thus greater management entrenchment), was associated with lower firm value, but only after the Delaware Supreme Court's 1985 opinion in *Moran v. Household*, which validated the use of the poison pill and "greatly increased the importance of shareholder rights."[4] Cremers and Ferrell concluded that the evidence undermined the narrative that the association is due to lower-valued companies weakening shareholder rights, rather than limits on shareholder rights lowering firm valuations.[5] Many earlier studies had found that weaker shareholder rights generally[6] or specific takeover defenses[7] were associated with poorer performance and lower firm value. Shareholder proposals played a key

---

[2] 2012 Guidance, at 14.

[3] Release, at 141.

[4] Martijn Cremers & Allen Ferrell, "Thirty Years of Shareholder Rights and Firm Valuation," at 4 (2013) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1413133).

[5] Id. at 27-28.

[6] See, e.g., Paul Gompers et al., "Corporate Governance and Equity Prices," Quant. J. Econ., 118(1), 107-155 (Feb. 2003) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=278920).

[7] See, e.g., Olubunmi Faleye, "Classified Boards, Firm Value, and Managerial Entrenchment," 83 J. F. Econ. 501 (2007) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=877216); Lucian Bebchuk et al., "What Matters in Corporate Governance," Rev. Fin. Stud., Vol. 22, No. 2, 783-827 (Feb. 2009) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=593423).

role in spurring companies to declassify their boards and eliminate other entrenching structures.

More broadly, the Release does not discuss any of the studies that have found stronger environmental, social and governance (ESG) performance more generally to be linked to lower risk and better corporate financial performance. These studies are germane because nearly all shareholder proposals seek improvements in some aspect of ESG performance where stronger board oversight and disclosure of ESG related practices and policies tied to the long-term business strategy add to the bottom-line. For example, a 2015 study reviewed the academic literature and found that 62% of meta-analyses showed a positive relationship between ESG performance and corporate financial performance.[8] MSCI found that high-ESG rated companies were more profitable, paid higher dividends, and had fewer "idiosyncratic risk incidents" involving large stock price declines.[9] Similarly, Bank of America Merrill Lynch found in a 2016 study that the stock of companies with the highest ESG scores outperformed the stock of companies with the lowest ESG scores and that higher ESG stocks had "lower price volatility and less extreme price declines."[10] A more recent report by Bank of America asserted that "a strategy of buying stocks that rank well on ESG metrics would have outperformed the market by up to 3 percentage points per year over the last 5 years."[11] Specifically, as a leader and member of the Midwest Investors Diversity Initiative ("MIDI"), the Trust has used the shareholder resolution process to engage companies on board diversity, which many studies have shown leads to lower risk and superior stock market and financial performance across a variety of metrics.[12]

---

[8] Gunnar Friede et al., "ESG and Corporate Financial Performance: Mapping the Landscape," p.7 (Dec. 2015) (https://institutional.dws.com/content/_media/K15090_Academic_Insights_UK_EMEA_RZ_Online_151201_Final_(2).pdf).

[9] Guido Giese, "Foundations of ESG Investing: How ESG Affects Equity Valuation, Risk, and Performance," J. Portfolio Mgmt., at 4-5 (July 2019) (https://www.msci.com/documents/10199/03d6faef-2394-44e9-a119-4ca130909226).

[10] Bank of America Merrill Lynch, "ESG: Good Companies Can Make Good Stocks" (Dec. 18, 2016) (https://www.iccr.org/sites/default/files/page_attachments/equitystrategyfocuspoint_esg.pdf).

[11] Bank of America Merrill Lynch, "ESG Matters—US; 10 Reasons You Should Care About ESG" (Sept. 23, 2019) (https://www.bofaml.com/content/dam/boamlimages/documents/articles/ID19_1119/esg_matters.pdf?mod=article_inline).

[12] See Credit Suisse, "Gender Diversity and Corporate Performance" Aug., 2012 (https://www.calstrs.com/sites/main/files/file-attachments/csri_gender_diversity_and_corporate_performance.pdf). https://newsroom.bankofamerica.com/system/files/2019_Environmental_Social_Governance.pdf; Vivian Hunt, Dennis Layton & Sara Prince, "Diversity Matters," McKinsey & Company, Feb. 2, 2015 (http://www.diversitas.co.nz/Portals/25/Docs/Diversity%20Matters.pdf).

The event studies on which the Release relies, which measure stock price reactions to developments in the shareholder proposal process, have several shortcomings that limit their utility in this context. They tend only to measure reactions over the short term, whereas the kinds of reforms promoted in shareholder proposals take time to increase value. Nonetheless, the Commission explained that it relies on these short-term studies because long-term effects can "be hard to attribute" to the proposals.[13] We note that a 2018 study of global ESG engagements looked at returns over a longer one-year period, finding that successful engagements led to higher sales growth and that successfully engaged firms with low ESG scores prior to engagement had statistically significant excess cumulative abnormal returns compared with similar non-engaged firms in the year following closure of the engagement. The study also found "no evidence that targets are negatively affected by the activism."[14]

Event studies of stock price reactions capture shareholders' expectations regarding the future impact of the proposal or implementation of the suggested reform, and these expectations may turn out not to be true. Despite focusing on short-term price reactions, these studies may support inferences other than the market reacting positively or negatively to the substance of a particular shareholder proposal. For example, companies generally announce all of their voting results at the same time, so it is possible that market participants are reacting to votes on other ballot items such as director elections. One study has suggested that resorting to the shareholder proposal process by an institutional investor known to engage in pre-filing outreach may send signals about management responsiveness.[15]

The Commission is proposing to impair shareholders' ability to pursue ESG-oriented reforms, including value enhancing reforms, through the shareholder proposal process at the same time as ESG investment strategies are exploding in popularity[16] and mainstream investors are recognizing the connection between ESG factors and value. BlackRock CEO Larry Fink recently announced that the company

---

[13] Release, at 113 n.214.

[14] Tamas Barko et al., "Shareholder Engagement on Environmental, Social, and Governance Performance" (Sept. 2018) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2977219).

[15] See Andrew Prevost & Ramesh Rao, "Of What Value Are Shareholder Proposals Sponsored by Public Pension Funds," J. Business (Apr. 2000) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=178912).

[16] See Leslie P. Norton, "Sustainable Funds Set to See a 'Tsunami' of New Capital," *Barron's* (Nov. 19, 2019) (https://www.barrons.com/articles/sustainable-funds-set-to-see-a-tsunami-of-new-capital-51574254801?mod=article_inline); Hazel Bradford, ""70% of Institutional Investors Apply ESG to Investment Decisions—Survey," *Pensions & Investments*, Oct. 16, 2019 (https://www.pionline.com/esg/70-institutional-investors-apply-esg-investment-decisions-survey); https://www.unpri.org/news-and-press/pri-signatory-growth-shows-strong-momentum/3987.article; https://401kspecialistmag.com/almost-half-of-institutional-investors-consider-esg-in-investment-decisions/; https://newsroom.bankofamerica.com/system/files/2019_Environmental_Social_Governance.pdf.

would undertake several initiatives to "place sustainability at the center of [its] investment approach," citing emerging risks to long-term value such as "ruthless" drug price hikes by pharmaceutical companies.[17] State Street Global Advisors has stated that "ESG factors can be used to mitigate risk and identify potential alpha signals."[18] Savita Subramanian, head of U.S. Equity and Quantitative Strategy for Bank of America Merrill Lynch, recently stated:

> Environmental, social and governance attributes are a better signal of earnings risk than any other metric we've found. Investors are learning that good companies can make good stocks. . . . Our analysis of results from combining ESG with other fundamental factors when making stock selections shows that adding ESG would have consistently outperformed fundamental strategies with less risk.[19]

Use of ESG data is not limited to equity investors. A report from Fitch Ratings found that "about half the lending assets covered by 182 banks it surveyed in the third quarter [of 2019] [were] screened for ESG risks."[20] Pimco, which runs the world's largest bond fund, offers ESG-focused fixed-income funds,[21] and also describes using ESG factors in regular credit analysis.[22] Ratings agency Standard & Poors recently stated that it believes ESG analysis provides a holistic view of potential areas of environmental and social risk and opportunity for companies in rapidly evolving markets.[23] Likewise, according to the Global Infrastructure Hub, a G20 initiative, 36% of institutional infrastructure investors "consider ESG to be a 'first order question,'" up from just 17% in 2016.[24] Given investors' dissatisfaction with the limited ESG disclosure provided in companies' periodic reports,[25] curtailing shareholders' ability to seek additional disclosure from companies would not be consistent with an investor protection mandate.

---

[17] https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter

[18] https://www.ssga.com/investment-topics/environmental-social-governance/2019/03/esg-data-challenge.pdf

[19] https://newsroom.bankofamerica.com/system/files/2019_Environmental_Social_Governance.pdf

[20] Leslie P. Norton, "More Banks Are Screening for ESG Risks in Underwriting," *Barron's*, Jan. 7, 2020 (https://www.barrons.com/articles/banks-screening-esg-risk-underwriting-borrowing-fitch-51578415298).

[21] See https://www.pimco.com/en-us/investments/esg-investing

[22] C. Del Anderson, "ESG in Action: Evaluating Global Financials" (Sept. 2017) (https://www.pimco.com/en-us/insights/viewpoints/esg-in-action-evaluating-global-financials/)

[23] https://www.spglobal.com/_assets/documents/ratings/the-esg-advantage-exploring-links-to-corporate-financial-performance-april-8-2019.pdf

[24] Global Infrastructure Hub, *Global Infrastructure Investor Survey Report 2019*, pp. 66-67 (Apr. 2019) (https://cdn.gihub.org/umbraco/media/2564/global-infrastructure-investor-survey-report-2019.pdf).

[25] Valerie E. Harper Ho, "Nonfinancial Risk Disclosure & the Costs of Private Ordering," Am. Bus. L. J., vol. 55, issue 3, 404-474, at 411 (Fall 2018) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3108363).

The Trust has obtained many value-enhancing reforms using the shareholder proposal process. For example, we negotiated settlements with six companies involved in the opioid epidemic in which they agreed to strengthen their policies for clawing back or recouping executive incentive compensation in the event of misconduct.[26] Our shareholder proposal prompted Equifax, in the wake of its massive data breach, to improve its board oversight of risks related to cybersecurity.

Shareholder proposals are indispensable in obtaining these reforms. The Release refers to the "level and ease of engagement between companies and their shareholders," which the Commission asserts has increased since the last rulemaking on Rule 14a-8.[27] In our experience, though, there is no substitute for the shareholder proposal process. Companies have ignored more informal overtures, such as letters, and responded to requests for dialogue only after the filing of a proposal. More subtly, the submission of a shareholder proposal has prompted companies to bring to the table personnel with expertise relevant to the proposal, moving an engagement from a superficial exercise, to a more meaningful dialogue in which settlement can be reached. Even those companies that do not require a proposal to engage meaningfully know that a breakdown in the dialogue can result in a filing, and that possibility shapes their behavior.

It is important to note, given the Release's focus on majority votes, that many of the reforms the Trust has obtained did not follow majority votes. In some cases, settlements were reached without the proposal going to a vote at all. Thus, this benefit of shareholder proposals is not dependent on obtaining majority support.

Based on empirical evidence, it is likely that a significant proportion of shareholder proposals seek value-enhancing reforms and that a 37% reduction in proposals would negatively impact companies and shareholders. The release makes no effort to analyze the extent to which value-enhancing reforms would be foregone as a result of that drop, a key cost of adopting the Proposed Amendments.

Shareholder Communication

The Release concedes that shareholder communication could be affected by the Proposed Amendments but does not weigh the loss of that function in the cost-benefit analysis. Shareholder communication, both with each other and with companies, has long been recognized as a key benefit of Rule 14a-8.[28] The

---

[26] See https://www.iccr.org/sites/default/files/page_attachments/ioa_two_year_summary_report.pdf

[27] Release, at 18.

[28] See Alan R. Palmiter, "The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation," 45 Ala. L. Rev. 879, 901 (1994) (https://wakespace.lib.wfu.edu/handle/10339/26139)

Commission itself stated that it was raising the ownership threshold only to $2,000 in 1998 because Rule 14a-8's objective was "providing an avenue of communication for small investors."[29] The shareholder proposal process helps to combat the collective action/free rider problem that tends to discourage investors from seeking change by reducing the costs associated with such efforts.[30]

The communication value of the shareholder proposal process does not depend on proposals reaching a particular level of support. Indeed, a low vote could communicate to the proponent and company that the issue addressed in the proposal is not of concern to investors. Shareholders that are not proponents may also benefit from the communication Rule 14a-8 fosters. Shareholders that do not file proposals due to business or regulatory constraints can still communicate using their votes on shareholder proposals.

Outside Perspectives

Boards and upper management tend to have homogeneous backgrounds and experiences, which can prevent them from accurately assessing companies' risks and opportunities. Shareholder proposals allow the introduction of outside viewpoints, helping to counter these biases and alert top decision makers about emerging issues and approaches.

The Trust's experience in MIDI illustrates this process. Prior to MIDI's inception, investors had engaged companies on board diversity, with a focus on adopting general policies expressing a commitment to increasing diversity or disclosing existing efforts to increase diversity. After such measures were implemented, however, board diversity often did not improve, leading some investors to look for a way to effectively operationalize companies' commitments.

MIDI was formed in 2016 to ask companies to adopt a diverse search policy modeled after the National Football League's "Rooney Rule." The diverse search policy promoted by MIDI[31] requires that qualified female and minority candidates be included in the initial search list for every open board seat. To date, twenty-three companies have adopted diverse search policies and twelve companies have added

---

[28] "Dodd Stands Up for Shareholder Rights" (Nov. 1, 2007) (https://www.banking.senate.gov/newsroom/minority/dodd-stands-up-for-shareholder-rights).
[29] Exchange Act Release No. 40018 (May 21, 1998).
[30] An investor that seeks change will bear all of the costs of doing so, but resulting benefits will be shared with all shareholders. Without Rule 14a-8, a shareholder seeking to put a proposal before other shareholders would be required to file and distribute its own proxy materials, which is prohibitively expensive for most investors.
[31] Some companies received shareholder proposals, while others responded to informal approaches and reached settlements without proposals.

diverse candidates.[32] Bringing such a novel approach to boards, then, has led to increased diversity, which the research cited above indicates is value-enhancing.[33]

Cost of Capital

In addition to investor protection, the Commission must consider the impact on competition, efficiency and capital formation when it engages in rulemaking.[34] Because shareholder proposals are integral to promoting ESG reforms, over the longer term we believe that the Proposed Amendments will cause ESG performance among U.S. companies to degrade, increasing companies' cost of capital.

Academic studies indicate that ESG performance and cost of capital are negatively correlated. In a 2011 study, companies with better corporate social responsibility performance had lower costs of equity capital, with specific drivers identified as improved employee relations, environmental policies and product strategies.[35] MSCI analyzed the impact of changes in ESG ratings and concluded that improved ESG performance is not only associated with, but causally related to, lower cost of capital.[36]

BlackRock CEO Larry Fink recognized the relationship between ESG performance and cost of capital in his recent letter to CEOs. Fink predicted, "[o]ver time, companies and countries that do not respond to stakeholders and address sustainability risks will encounter growing skepticism from the markets, and in turn, a higher cost of capital."[37] The Release does not mention this possibility or weigh it against the meager projected cost savings.

Even though material to the long-term value of our portfolio, the Trust recognizes that the value of some of the benefits we have identified may be difficult to quantify with precision. Under the 2012 Guidance, however, the Commission must still consider the impairment of these benefits when weighing costs and benefits of the Proposed Amendments. At a minimum, the Commission should estimate the proportion of proposals that will not be considered as a result of the

---

32 https://illinoistreasurergovprod.blob.core.usgovcloudapi.net/twocms/media/doc/midwest%20investors%20diversity%20initiative%20gains%20traction%20in%20board%20diversity%20(8.13.2019).pdf

33 See FN 12, *supra*.

34 See 15 U.S.C. section 78c(f).

35 Sadok El Ghoul, "Does Corporate Social Responsibility Affect the Cost of Capital?" J. Banking & Fin., Vol. 35, Issue 9, 2388-2406 (2011) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1546755).

36 Guido Giese, "Foundations of ESG Investing: How ESG Affects Equity Valuation, Risk, and Performance," J. Portfolio Mgmt., at 10-11 (July 2019) (https://www.msci.com/documents/10199/03d6faef-2394-44e9-a119-4ca130909226).

37 https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter

Proposed Amendments that would have been value-enhancing, and weigh that impact, along with other costs, against the benefits. Depending on commenters to develop this record, as the Release would do, does not satisfy the Commission's obligations under the 2012 Guidance.

Shareholders' Use of Non-14-8 Strategies

In addition to the loss of important benefits, the Proposed Amendments would impose more direct costs. Shareholders may turn to other strategies, should the shareholder proposal process become unavailable, and those strategies may be costlier and more disruptive for companies than the current regime. Rather than submit shareholder proposals on executive incentives, investors may oppose companies' "say on pay" proposals or proposals to approve incentive compensation plans. Shareholders may also oppose the re-election of directors more frequently; for example, rather than filing a proposal asking for an independent chair, shareholders might vote against members of the nominating and governance committee responsible for board leadership structure, assuming there was an initial determination that independent board leadership was critical for adequate company oversight and enhanced future corporate performance.

If shareholder proposals become less feasible, the standard required under shareholders' proxy voting guidelines to vote against directors or oppose other management proposals could be lowered, making it easier to succeed at such initiatives. It seems unlikely that companies would view more favorably a world with more failed director elections and costly battles to approve proposals that pass easily now. Shareholders might also focus more attention on identifying and running director candidates, especially at companies with proxy access.

Strategies outside the proxy voting context could also be employed more often. Books and records requests can seek information on risks facing the company in the same way shareholder proposals do. The current 14a-8 process is efficient, and making it less available could lead to very small cost savings for companies that received proposals but higher costs, including indirect costs associated with board and management attention, for a smaller number of companies selected for more intensive initiatives. These possibilities should be incorporated into the Commission's cost-benefit analysis.

Minuscule and Poorly-Supported Cost Savings for Companies

The substantial costs resulting from curtailment of the shareholder proposal process far outweigh the tiny financial benefits to companies resulting from the Proposed Amendments. According to the Release, annual financial benefits for all Russell 3000 companies resulting from the higher ownership and resubmission thresholds, as well as the "one-proposal-per-person" rule, are projected to be between $4.5 and $79.5 million.[38] With 3,020 companies in the index,[39] the average Russell 3000 company would save between $1,490.07 and $26,324.50.

That number is infinitesimal, especially for the larger companies that receive more proposals. For example, Berkshire Hathaway, one of the largest constituents of the Russell 3000 (which is market capitalization-weighted), had over $4.322 billion in income in 2018. Even the high-end cost savings of $26,324.50 represents only .0006% of that income. A smaller Russell 3000 constituent, Cheesecake Factory, had 2018 net income of $99 million, of which $26,324.50 accounts for only .027%. Indirect costs are not significant, in context, as the average Russell 3000 company receives one shareholder proposal every 7.7 years.[40] Larger companies that are more likely to receive proposals have greater resources to devote to them. The small size of these cost savings means they are not likely to "be a positive factor in the decision of firms to go public," as the Release states.[41]

The cost savings estimates the Release provides are not sufficiently reliable to be used in the Commission's cost-benefit analysis. The Release draws on estimates of the costs associated with the shareholder proposal process contained in company comments on the Statement Announcing SEC Staff Roundtable on the Proxy Process (the "Roundtable"): "Two commenters cited an estimate indicating an average cost to companies of $87,000 per shareholder proposal, another commenter estimated its own cost at more than $100,000 per proposal, and a third commenter cited a cost of approximately $150,000 per proposal."[42]

The Commission used the $150,000 estimate in its Paperwork Reduction Act calculations,[43] but the figure is entirely unsupported. It derived from a Roundtable comment by the American Securities Association (the "ASA"), a trade association representing regional financial services firms.[44] The ASA cited a report by the House Financial Services Committee, which asserted the $150,000 figure without citing any source or describing what it included.[45] Thus, the ASA's figure does not provide an adequate basis for the Commission's cost savings estimates.

---

[38] Release, at 137-38, 140.

[39] https://www.ftserussell.com/research-insights/russell-reconstitution/market-capitalization-ranges

[40] See https://www.cii.org/files/10_10_Shareholder_Proposal_FAQ(2).pdf.

[41] See Release, at 150.

[42] Release, at 12 (footnotes omitted).

[43] The Commission did not explain why it viewed the $150,000 figure—the highest one cited by commenters—as the best one on which to base its Paperwork Reduction Act calculations.

[44] See https://www.sec.gov/comments/4-725/4725-5646621-185668.pdf.

[45] Report on H.R. 5756, "To Require the Securities and Exchange Commission to Adjust Certain Resubmission Thresholds," at 2 (Aug. 24, 2018) (https://republicans-financialservices.house.gov/uploadedfiles/crpt-115hrpt904.pdf) It is worth noting that the report stated that the "cost of a proposal *can run* $150,000 per measure" (emphasis added), suggesting that this figure is at the high end of a range of costs.

The $87,000 estimate was cited in comment letters by BlackRock and the Society for Corporate Governance (the "Society"). BlackRock's source was a 2008 study by Dos Santos and Song, which was funded by the U.S. Chamber of Commerce.[46] Dos Santos and Song, for their part, cited a 2003 law review article, which had relied on 1997 Commission survey data.[47]

The Commission's survey responses were problematic. One question asked companies to indicate what they spent to determine whether to include or exclude a proposal. Eighty companies responded with a range of values from $10 to $1.2 million.[48] The Commission admitted that some survey responses "may have accounted for consideration of more than one proposal,"[49] and it seems clear that the $1.2 million estimate falls into this category. The median response of $10,000 was significantly lower than the average of $37,000, suggesting that the average was likely skewed upward by a few unrealistically high values.

The second question asked companies to estimate the costs of printing, postage and tabulation for a single proposal. Sixty-seven companies provided estimates ranging from $200 to nearly $900,000, which, like responses to the first question, "may have accounted for the printing of more than one proposal."[50] The $10,000 median response, only one-fifth as large as the average, shows that a few very high values skewed the average here as well.

Data from the late 1990s is too outdated to be used in a cost-benefit analysis, given the major changes that have taken place in the distribution of proxy materials and electronic voting. Broadridge reported that in 2019 its "technologies and processing for e-delivery, house-holding and account consolidations . . . saved corporate issuers and mutual funds over $1.7 billion in paper, printing and postage in comparison to what they would have spent had all materials been mailed as full sets." As Broadridge distributed proxy materials for 4,216 meetings, the average cost savings per meeting was over $403,000.[51] Broadridge could likely provide data that would enable the Commission to estimate costs of distributing and tabulating an additional proposal.

Finally, ExxonMobil submitted the Roundtable comment letter cited for the $100,000 per-proposal estimate. Exxon Mobil claimed that each proposal costs the

---

[46] See Joao Dos Santos & Chen Song, ""Analysis of the Wealth Effects of Shareholder Proposals," at 1, 6 (2009) (https://www.uschamber.com/sites/default/files/legacy/reports/080722wfi_shareholder.pdf).

[47] See Dos Santos & Song, at 13; Exchange Act Release No. 40018 (May 21, 1998) (describing results of 1997 survey).

[48] Exchange Act Release No. 40018 n.95 and accompanying text (May 21, 1998).

[49] Id.

[50] Exchange Act Release No. 40018, n.107 and accompanying text.

[51] https://www.broadridge.com/_assets/pdf/broadridge-proxy-season-stats-final.pdf

company $100,000, "even for identical, repeat proposals."[52] Apparently, ExxonMobil would have us believe that no economies of scale would result from having analyzed, challenged and opposed a proposal in previous years. It strains credulity that the costs associated with analyzing and challenging an identical proposal year after year would stay stable. In our experience, challenges to substantially similar proposals in different years tend to recycle significant amounts of material, and companies facing the same proposal in a particular year may also submit no-action requests with duplicative material. For example, this season companies challenged three independent chair proposals submitted to pharmaceutical firms by IOPA members, asserting that they were excludable on ordinary business grounds, and the requests closely resembled one another.[53] Statements in opposition remain largely the same in later years, and time spent by management and the board would also likely decrease as a result of previous familiarity with a proposal. The Commission could analyze no-action requests and statements in opposition to determine the extent of similarities, which would shed light on the extent to which companies are able to take advantage of economies of scale and test companies' assertions regarding the costs of repeat proposals.

The Commission has an obligation to provide the factual record on which its economic analysis is based.[54] The Release has simply punted on the predicted cost savings, pointing to company estimates that are outdated, unsourced and unreliable, and does not explain why it chose the unsupported $150,000 per proposal figure for the Paperwork Reduction Act analysis. As the benefits of the Proposed Amendments are limited to cost savings (direct and indirect), it is especially important that the Commission establish a basis for its estimates. The Proposed Amendments should not be adopted on this record, and we urge the Commission to collect the necessary data from market participants and third parties, and to analyze relevant data in the Commission's possession.

Ownership Threshold

The Proposed Amendments would raise the ownership threshold for submitting a proposal from the current level of $2,000 for one year to a tiered structure requiring a $25,000 stake for one-year holders; imposing a two-year holding duration for shareholders owning between $15,000 and $25,000; and allowing owners of between $2,000 and $15,000 to submit a proposal only after they have held for three years. Raising the ownership threshold is, the Commission

---

52 https://www.sec.gov/comments/4-725/4725-5879063-188728.pdf

53 See https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/trilliumoneida121319-14a8-incoming.pdf; https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/riersvpic122019-14a8-incoming.pdf; https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/sistersstfrancis121919-14a8-incoming.pdf.

54 2012 Guidance, at 16 ("The proposing release should include a substantially complete analysis of the most likely economic consequences of the rule proposal.").

claims, necessary in order to keep up with inflation and the growth of the equity markets. In other words, the threshold needs to be updated. However, $2,000 in 1998 dollars adjusted for inflation would be only $3,152 in 2019; adjusting for the growth of the equity markets, the new threshold would be $8,379.[55]

The Commission does not explain how the need for updating justifies the significantly higher thresholds proposed in the Release. The Commission's reasoning on this point is circular—"holding $2,000 worth of stock for a single year does not demonstrate enough of a meaningful economic stake or investment interest in a company to warrant the inclusion of a shareholder's proposal in the company proxy statement."[56] The Release makes conclusory assertions about the proposed thresholds "more appropriately balanc[ing]" shareholders' and companies' interests,[57] but doesn't explain why the new threshold amounts are the right ones. The reference to "tak[ing] advantage of the process" suggests that the Commission is concerned with abuse, but the Release contains no evidence that smaller holders are abusing the 14a-8 process.

The Release does not adequately analyze the impact of the higher ownership thresholds on small shareholders, including retail investors,[58] or the interaction between that impact and the potential loss of value enhancing proposals discussed earlier. The Commission admits that the higher thresholds will have a "disproportionate impact" on individual proponents.[59] The Commission's own data indicates that individuals file more value-enhancing proposals[60] and that the smaller the ownership stake, the more likely a proposal will receive a majority vote.[61] Those are powerful arguments *against* significantly raising the ownership threshold, but the Release brushes them aside.

The Release claims that the proposed changes do not disadvantage smaller investors because they have "discretion in how frequently they trade shares"[62] and thus could file a proposal after holding for three years. Shareholder proposals are

---

[55] Release, at 19.
[56] Release, at 19.
[57] Release, at 20.
[58] In our view, the substantially increased ownership thresholds are inconsistent with the commitment Chairman Clayton professes to have to "Main Street" investors. See, e.g., "Remarks to the Economic Club of New York" (Sept. 9, 2019) (https://www.sec.gov/news/speech/speech-clayton-2019-09-09); see also, e.g., Transcript, "Perspectives on Securities Regulation Featuring a Conversation With U.S. Securities and Exchange Commission Chairman Jay Clayton," Brookings Institution (Sept. 28, 2017) (https://www.brookings.edu/wp-content/uploads/2017/10/es_20170928_securities_clayton_transcript.pdf).
[59] Release, at 144.
[60] Release, at 144.
[61] Release, at 94 fn.188.
[62] Release, at 126 fn.251.

often filed as a result of company-specific developments, though, and forcing a small holder to wait that long to file a proposal could mean the loss of a value-enhancing reform. Changes in a service provider such as a broker or investment manager can interrupt the continuity necessary to satisfy the duration requirement. Such a change does not reflect on the shareholder's "investment interest" in the company, but could preclude the filing of a shareholder proposal.[63] An adequate cost-benefit analysis requires the Commission to analyze both the impact of the higher ownership threshold on the submission of value-enhancing reforms and on investors' ability to pursue reforms in a timely way when corporate developments require urgent attention.

Resubmission Thresholds

The Release proposes to significantly raise the vote levels shareholder proposals must achieve in order to be eligible to be resubmitted in future years. Now, those levels are 3% if the proposal has been voted on once in the previous five years, 6% if it has been voted on twice, and 10% if it has been voted on three times or more; if the necessary level is not achieved, a three-year cooling off period is imposed.[64] The Trust believes that these thresholds do a good job of screening out proposals that do not have meaningful support, and are unlikely to prompt the adoption of value-enhancing reforms, from those that merit continued consideration. The Proposed Amendments would raise the thresholds to 5, 15 and 25% and allow exclusion of a proposal whose support has dropped by more than 10% between the last two times shareholders voted on it, provided it has been voted on three or more times in the past five years neither of the most recent votes was a majority. (The latter requirement has been dubbed the "Momentum Requirement").

Two faulty assumptions drive the analysis in this section of the Release. First, the Commission seems to view the trend toward fewer exclusions on resubmission grounds as evidence that the resubmission thresholds are not working to screen out non-meritorious proposals.[65] The Trust believes that the opposite is true: Shareholders have learned to choose issues that are material to a significant proportion of other shareholders, craft proposals that can obtain broad support, and avoid pitfalls, such as excessive prescriptiveness, that can lead to lower support. Thus, a declining rate of exclusion does not establish a need for change. The Release cites "public views," "calls for reform," dueling statistics regarding the frequency of

[63] See, e.g., Release, at 22.
[64] We strongly oppose a longer cooling-off period, like five years, on the ground that company-specific factors, as well as trends in a company's industry and the broader environment, can lead a proposal to resonate more with other shareholders. Five years is too long to wait to bring back a potentially value-enhancing reform.
[65] See Release, at 45 (citing report finding that "[w]hen the SEC first adopted the [resubmission] thresholds. Between one-half and three-quarters of proposals failed to win sufficient support for resubmission," but a "much smaller" number are excluded now).

resubmissions, and the competing views of various groups, but falls back on the likelihood of proposals obtaining majority support as its justification for raising the resubmission thresholds.

But the importance of majority votes on proposals is overstated. The Commission claims that this emphasis is warranted because proposals that receive majority support are more likely to be implemented than proposals that are not supported by a majority of shares. The study the Release cites for this proposition, however, omitted a key group of proposals—those that were settled without a vote. As discussed above, the Trust has obtained valuable settlements without having to go to a vote on proposals. Indeed, these proposals *were actually implemented*, so statistics that ignore them are misleading. As a result, the need for higher resubmission thresholds cannot be justified by the likelihood of a proposal obtaining a particular vote on first submission eventually obtaining majority support.

Many value-enhancing reforms whose support built slowly would have been excludable under the proposed thresholds, cutting off debate prematurely. Proposals on shareholder rights, including board declassification proposals, that now regularly achieve majority support, took a number of years to gain momentum. Commissioner Jackson argued in his dissent from approval of the Proposed Amendments that 40% of proxy access proposals and more than half of proposals to limit executive stock sales would not have met the revised resubmission thresholds.[66]

The proposed higher thresholds would also have impaired shareholder communication about companies on which shareholders were raising an early warning. Proposals seeking lobbying disclosure were filed every year at Boeing, which is now facing catastrophic safety issues with its 737MAX aircraft, beginning in 2014. The lobbying proposal voted on in 2017, the same year the 737MAX was approved by the FAA, argued that Boeing's "lobbying on safety record reporting has attracted media scrutiny," and commentators have noted that the FAA delegated crucial safety certifications to Boeing.[67] According to an analysis by Si2, the lobbying proposal, which turned out to be prescient, would have been excludable after 2016 if the proposed resubmission thresholds had been in effect.[68] The Release does not analyze the impact of precluding continued consideration of such value-enhancing proposals in its cost-benefit analysis.

The Momentum Requirement lacks adequate justification. The Release asserts, without support, that the Commission "believe[s] that a 10 percent decline

---

66 Commissioner Robert J. Jackson, Jr., "Statement on Proposals to Restrict Shareholder Voting" (Nov. 5, 2019) (https://www.sec.gov/news/public-statement/statement-jackson-2019-11-05-open-meeting).

67 https://www.investors.com/news/boeing-737-max-service-return-2020-crisis-not-over/?src=A00220&yptr=yahoo

68 https://www.greenbiz.com/article/proposed-sec-rule-changes-could-impede-investor-activism

in the percentage of votes cast may demonstrate a sufficiently significant decline in shareholder interest to warrant a cooling-off period."[69] However, it does not distinguish between normal vote volatility, which may be driven by various factors including shifts in the company's shareholder base, and a substantial, permanent decline in shareholder support. No reason is provided to believe that a single dip from 30% to 26%, the example given in the Release,[70] portends waning support in the future. Why should a proposal whose support goes from 49 to 43% be viewed as less likely to be implemented by the company—the rationale used for increasing the resubmission thresholds—than a proposal whose support dips from 29 to 27%? The Release also fails to analyze whether particular kinds of proposals would be more likely to be excluded pursuant to the Momentum Requirement. It is not possible to weigh the economic impact of the Momentum Requirement without data about vote volatility and the extent to which the Momentum Requirement would cause value-enhancing proposals would be excluded.

Mandatory Shareholder Offer to Meet

The Proposed Amendments would require that a proponent state in its proposal submission letter that it is available to meet with the company on identified days and times in a 20-day period commencing shortly after the submission deadline. The Trust believes that this provision is ill-considered and potentially counterproductive.

The Release claims that the mandatory meeting requirement is intended to "encourag[e] engagement."[71] But there is no good reason to think that it will have that effect. Sometimes, a company prefers to wait until its no-action request is resolved to engage because a successful request will eliminate the proposal and obviate the need for engagement. Other times, companies have declined to meet without specifying a reason. In our view, the assumption that shareholders have to be forced to engage is wrongheaded.

The compelled meeting during the busy proposal deadline season presents challenges for both companies and shareholders. Companies will be hard-pressed to assemble personnel with appropriate expertise to engage substantively on the proposal, given the short notice, and schedules of both investors and companies are crowded not only with proposal-related business but also with holiday obligations. The requirement imposes on shareholders the burden of holding open multiple time slots for a meeting that may never happen, and it is unclear how disputes over such meetings would be adjudicated. The Commission has failed to establish a justification for the mandatory offer to meet, nor has it shown that the requirement is likely to further the ostensible objective of promoting engagement. The standard

---

[69] Release, at 59.
[70] See Release, at 58.
[71] Release, at 33.

set in the 2012 Guidance, which states that the Commission should identify the need for the rule and explain how the proposed rule will meet that need, has not been met.

* * *

We appreciate the opportunity to provide the Commission with our views. If you have any questions, or need anything further, please do not hesitate to contact me at [redacted] or [redacted]

Sincerely,

Meredith Miller

Meredith Miller
Chief Corporate Governance Officer